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# In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 221

FANNIE E. UNTERMYER, AS EXECUTRIX, AND EDWARD D. Untermyer, as executor, of the last will and testament of Isaac Untermyer, deceased, Petitioners

*v.*

CHARLES W. ANDERSON AS COLLECTOR OF INTERNAL Revenue of the United States for the Third District of New York

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE RESPONDENT

### OPINION BELOW

The case was decided in the courts below without opinion, both courts following the decision of the Circuit Court of Appeals for the same circuit in *McNeir* v. *Anderson,* rendered January 10, 1927, 16 F. (2d) 970.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 13, 1927. This Court granted

a writ of certiorari on May 2, 1927, pursuant to the Act of February 13, 1925. (R. 28.)

STATEMENT

The action was brought by Isaac Untermyer, to recover from the Collector of Internal Revenue the sum of $2,782.86, with interest, the amount of a tax paid under protest on gifts made by the testator on May 23, 1924, to the amount of $193,100, the tax having been assessed pursuant to the gift-tax provisions of the Revenue Act of June 2, 1924, c. 234, Sections 319–324, 43 Stat. 253, 313 (U. S. C., Title 26, Secs. 1131–1136). While the suit was pending and on August 31, 1926, Untermyer died, and thereafter it was duly revived and continued in the name of petitioner. (R 11.) The case was tried in the District Court on an agreed statement of facts. (R. 14–16.) At the conclusion of the trial both sides moved for a directed verdict, and a verdict for the defendant was directed. (R. 20.) Upon writ of error the Circuit Court of Appeals affirmed the judgment of the District Court. (R. 28.) Thereafter petition for certiorari was duly filed and granted by this Court on May 2, 1927.

THE QUESTIONS PRESENTED

The questions involved in this case are similar to those in *Blodgett* v. *Holden,* decided by this Court November 21, 1927, the difference in the facts being that the gifts considered in *Blodgett* v. *Holden* were made in January, 1924, while the gift

with which the present case is concerned was made on May 23, 1924. (R. 16.) Should this Court hold that that difference is immaterial, we assume it will reach the same conclusion as in *Blodgett* v. *Holden* and no other questions will be considered. Should the Court hold that the difference is material, then the question of the constitutionality of the gift tax law may arise for decision. The relevant portions of the Act are printed in an appendix hereto. By Section 324 of the Revenue Act of February 26, 1926, c. 27, 44 Stat. 9, 86, Section 319 of the Revenue Act of 1924, was amended merely in respect to the rate of the tax, with the provision that that section should take effect as of June 2, 1924.

## ARGUMENT

### I

### THE CASE OF BLODGETT *v.* HOLDEN DID NOT DECIDE THAT THE GIFT TAX PROVISIONS OF THE REVENUE ACT OF 1924 WERE NOT RETROACTIVE, OR THAT ITS APPLICATION TO ALL GIFTS MADE PRIOR TO JUNE 2, 1924, WAS UNCONSTITUTIONAL

*Blodgett* v. *Holden* came to this Court upon certificate from the Circuit Court of Appeals for the Sixth Circuit. One of the questions certified, and the only question which this Court found it necessary to answer, was the following:

> Are the provisions of Sec. 319–324 of the Revenue Act of 1924, c. 234, 43 Stat. 313, unconstitutional insofar as they impose and

> levy a tax upon transfers of property by gifts *inter vivos,* not made in contemplation of death, and made prior to June 2, 1924, on which date the Act was approved, because the same is a direct tax and unapportioned, or because it takes property without due process, or for public use without just compensation, in violation of the Fifth Amendment?

Mr. Justice McReynolds delivered an opinion, three other Justices concurring, in which, after setting forth the question which we have quoted, the relevant provisions of the statute, and the fact that it was conceded that the transfers involved were made during the month of January, 1924, he said:

> The brief in behalf of the Collector sets out the legislative history of the gift tax provisions in the Revenue Act of 1924 and shows that they were not presented for the consideration of Congress prior to February 25 of that year. We must, therefore, determine whether Congress had power to impose a charge upon the donor because of gifts fully consummated before such provisions came before it.

The opinion then, referring to the case of *Nichols* v. *Coolidge,* 274 U. S. 531, decided May 31, 1927, holding that a tax "may be so arbitrary and capricious that its enforcement would amount to deprivation of property without due process of law within the inhibition of the Fifth Amendment," reached a conclusion expressed as follows:

> As to the gifts which Blodgett made during January, 1924, we think the challenged enactment is arbitrary and for that reason invalid. It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing.

The certified question was answered as follows:

> So far as the Revenue Act of 1924 undertakes to impose a tax because of the gifts made during January, 1924, it is arbitrary and invalid under the due process clause of the Fifth Amendment. And the question is so answered.

Eight justices sat in the case and four united in a separate opinion written by Mr. Justice Holmes. Those justices were of opinion that—

> the Act should be read as referring only to transactions taking place after it was passed, when to disregard the rule "would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways." *Lewellyn* v. *Frick,* 268 U. S. 232, 251, 252.

That opinion concluded:

> I agree with the result that the plaintiff is entitled to recover the taxes paid in respect of gifts made before the statute went into effect.

The careful language used in answering the question so as to restrict the answer to "gifts made during January, 1924," coupled with the reference to the Congressional history of the legislation showing that the gift tax provisions of the Act were not presented for the consideration of Congress prior to February 25, 1924, plainly suggests that gifts made subsequent to February 25th may be, in a different category from gifts made prior thereto; and that to tax gifts made subsequent thereto may not be " so arbitrary and capricious " as to violate the Fifth Amendment. All the Justices agreed that the particular gifts involved in *Blodgett* v. *Holden* were not taxable, four holding that to tax them would be unconstitutional, and four basing their opinion upon a construction of the statute. We feel that this uncertainty justifies us in presenting for the consideration of the Court the present case, because the gift involved was made long after February 25, 1924, on May 23, 1924, when the bill containing gift tax provisions had already passed both Houses of Congress, and after the conferrees appointed by the two Houses had adopted the report containing its provisions.

## II

### TO TAX THE GIFT HERE INVOLVED IS NOT TO MAKE THE LAW SO ARBITRARY AS TO BE UNCONSTITUTIONAL

The gift in question was made on May 23, 1924. (R. 16.) The legislative history of the gift tax provisions follows:

On February 25, 1924, in the Committee of the Whole House, Chairman Green, of the Committee on Ways and Means, proposed an amendment to the revenue bill which embodied the principle of the gift tax now under consideration. At that time he said (65 Cong. Rec., pt. 3, pp. 3119, 3120):

> Mr. Chairman, a gift tax is a corollary to an estate tax. It is perfectly idle to attempt to raise the estate tax, as we have done to-day, and make no provision with reference to gifts. The estate tax at the present time is being largely evaded by the splitting up of the large estates. I, myself, know of one large estate which has been divided into four parts by the owner thereof giving to his wife one part and one part to each of his three children. The gifts were made outright. They are absolute in form. They can not be attacked by the Treasury. But at the same time the man who made them has never lost control over the property. He now has as much control over the property as he ever had.
>
> This amendment also is needed on account of the income tax. The splitting up of large estates, of course, reduces the amount of surtaxes to be laid upon the party who so divides them. We have lost more, in my judgment, by the division of these large estates in our income taxes than we have lost by reason of tax-exempt securities, and we have lost millions upon millions by reason of tax-exempt securities.

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On the following day he proposed a modification of the terms of his amendment. (65 Cong. Rec., pt. 4, p. 3170.) On that day he said (p. 3172):

> Ever since I was connected with revenue matters, ever since I have been on the Ways and Means Committee, I have been endeavoring to get a gift tax inserted in the law. I proposed it at the first session when I was a member of that committee some 10 years ago. Ever since that time I have been laboring to get it inserted in the law, because I knew just exactly what would happen, namely, that these big estates would be gradually split up into different parts, thereby defeating both the income tax and the inheritance tax, and that is the reason our revenues are so rapidly decreasing from the big estates.

The bill containing a gift-tax provision was passed by the House on February 29, 1924. (65 Cong. Rec., p. 3354.)

On May 8, 1924, when the bill was before the Senate sitting as in Committee of the Whole, the Finance Committee proposed to strike out the gift-tax provisions of the House bill, but Senator Walsh, of Massachusetts, proposed substitute sections imposing gift taxes, and his amendment was accepted by the Senate. (65 Cong. Rec., pt. 8, pp. 8094–8097.) At that time Senator Walsh said (pp. 8095, 8096):

> There are provisions under the present law to tax gifts in anticipation of death. A

gift made within a two-year period prior to death is presumed to be a gift in anticipation of death and is included within the property that passes under the estate or inheritance tax. But there is no provision of law imposing a tax upon gifts between the living; and the greatest evasion of all evasions of the income tax has been the making of gifts by the head of a family to his wife and children, either directly or through trusts, for the purpose of having his income so reduced that he would fall within the lower brackets.

* * * * *

Again and again an effort has been made to impose some form of gift tax. In the last tax bill the Senate imposed a gift tax. It was stricken out in conference. At this session the House has imposed a gift tax and the Senate committee has recommended its removal. If the Senate now goes on record in favor of some form of gift tax, it will be enacted. It will be a question merely of rates, because the House has already committed itself.

Personally, I think we are acting when it is too late. I think the bird has flown. I think that so many and so extensive gifts have been made in the last seven years that it is almost impossible to collect anything under a gift tax. But that does not justify leaving the door wide open for a man to continue to make gifts which will permit him to escape the fair and just income and in-

heritance taxes imposed upon him under the law.

The purpose of gifts inter vivos is to lower the income tax by splitting up the volume of the taxable property.

Senator Simmons, the ranking minority member of the Finance Committee, added (p. 8096):

Mr. President, I do not as a general proposition feel disposed to give my assent to the principle involved in gift taxes. In ordinary conditions I would say that it is not a wise way of raising revenue for the Government. But conditions which confront us are abnormal and seem to me to make the imposition of a tax of this sort absolutely essential.

There are two kinds of taxes which we find it necessary to levy in the conditions which now obtain. One is the income tax, the other is the inheritance tax. From both of those taxes the Government realizes a very large amount of revenue, revenue that it can not dispense with, that is absolutely necessary to enable us to finance the Government. One of the favorite methods of evading the income tax is through the splitting up of large incomes among members of the family, thus evading the higher rates imposed by surtaxes. That has been very generally resorted to especially by men of large incomes and the Government has lost an immense amount of revenue through that means of evasion.

> The inheritance tax also has been extensively evaded in the same way. We have had no provision in the law up to this time that has afforded anything like adequate protection to the Government against those two methods of evasion. We have no statistics. Probably no statistics are available under any conditions, but we have none which would indicate exactly the amount of revenue that has been lost by this method of evading the income tax and this method of evading the estate tax as now imposed. But they have been sufficiently large and extensive, as is now generally conceded, to very greatly impair the revenues of the Government. It is a leak that ought to be stopped, and there is absolutely no way to stop it except by the imposition of a gift tax.

The bill containing a gift-tax provision was passed by the Senate May 10, 1924. (65 Cong. Rec., p. 8268.)

The bill went to conference, and, as reported by the Conference Committee, contained some amendments not material. (65 Cong. Rec., Part 9, pp. 9530, 9536, 9537.) The Conference Report, containing the gift tax provisions, was submitted in the Senate on May 22, 1924 (65 Cong. Rec., p. 9243), and in the House on May 24, 1924 (65 Cong. Rec., p. 9463). It was agreed to by the Senate on May 24, 1924 (65 Cong. Rec., p. 9421), and by the House on May 26, 1924 (65 Cong. Rec., pp. 9547,

9548). The bill was sent to the President on the same day and was approved by him on June 2, 1924.

The gift involved in this case was made the day after the Conference Report was submitted in the Senate and the day before it was agreed to by the Senate. Unless the Court is to hold that to tax any gift made before the Act was approved by the President is so arbitrary and capricious as to be a violation of the Fifth Amendment, it would seem that the gift here involved must be excepted from such condemnation. The provision had been under discussion in Congress for three months, had been passed by both Houses, had been sent to conference, and the conference had reported the bill containing the provisions. It was not until then that Mr. Untermyer made the gift. It is not an unfair inference that he had knowledge of these facts and that it was his intention to avoid the tax, if possible, before the bill should become law by the approval of the President. This is not said with intent to charge him with doing anything wrong. He had an undoubted right to seek to avoid payment of the tax by making the gift before the Act took effect. The only question is, was it arbitrary and capricious and confiscatory to tax a gift thus made?

It would not be so regarded in England.

In Halsbury's Laws of England, Vol. 27, p. 182, Sec. 352, it is stated—"There is no reason why a fiscal statute should not be retrospective if the language so directs," and in a footnote, *Hume* v. *Haig*

(1799), 8 Bro. Parl. Cas. 196, is cited as authority, and the footnote continues:

> The annual Revenue Acts, which frequently have not received the Royal Assent before the end of the session, have been made to operate so far as relates to the imposition of both existing and new duties from the date of the Resolution of the House of Commons. But in such cases, until the Act had been passed, there was, formerly, no legal obligation to pay the tax or authority to collect it (*Bowles* v. *Bank of England,* [1913] 1 Ch. 57); see now, however, Provisional Collection of Taxes Act, 1913 (3 Geo. 5, c. 3).

The statute referred to (3 Geo. 5, c. 3), provides that where a resolution is passed by the Committee on Ways and Means of the House of Commons (so long as it is a Committee on the Whole House) providing for the variation of any existing tax or for the renewal for a further period of any tax in force or imposed during the previous financial year, whether at the same or a different rate, and whether with or without modifications, and the Resolution contains a declaration that it is expedient in the public interest that the Resolution should have statutory effect under the provisions of the Act, the Resolution shall, for the period limited by the section and subject to the other provisions of the Act, have statutory effect as if contained in an Act of Parliament.

In the same work, Vol. 24, p. 537, in footnote (h) to Section 1046, it is stated:

> As a necessary precaution against evasion, the collection of many of the taxes and duties imposed by the annual Finance Acts commences as soon as the necessary resolutions have been passed by the House of Commons.

We know of no decision which has gone so far as to hold that it is so arbitrary as to offend the Constitution to tax a transaction which, like this, was not completed until the bill had passed both Houses and the differences had been adjusted by the conferees.

This case is not like that of *Nichols* v. *Coolidge*, 274 U. S. 531, decided May 31, 1927. There the Act of Congress reached back and dealt with a transfer which took place a dozen years before the law was passed and attributed to the property its value long after the transfer, and this Court said of such a law that it was "arbitrary, capricious and amounts to confiscation." Indeed, that is the only ground upon which an excise tax, uniform throughout the United States may be declared unconstitutional, assuming, of course, that the law has been enacted in the manner prescribed by the Constitution. This transfer was made after the taxpayer had been warned that Congress proposed to tax it and the warning had become a practical certainty. Under such circumstances, it is submitted, the tax can not be considered arbitrary and

unreasonable. Tax laws which were fully as retroactive as that which is involved in the present case have been sustained by this Court repeatedly. We submit that those decisions are controlling.

## III

### THE TAX LAW IS NOT NECESSARILY UNCONSTITUTIONAL BECAUSE RETROACTIVE

The only substantial question arising out of the retroactive features of the Act is whether they are so arbitrary and unreasonable as to violate the due process provision of the Fifth Amendment.

It is clearly established that retroactive legislation is not unconstitutional as such. The Constitution forbids Congress to enact ex post facto laws and it forbids the States to enact ex post facto laws and laws impairing the obligation of contracts, but with these express exceptions neither Federal nor State legislation is unconstitutional because it is retroactive. See, *e. g., Calder* v. *Bull,* 3 Dall. 386, 391; *The Peggy,* 1 Cranch, 103, 110; *Prize Cases,* 2 Black, 635, 670, 671; *Johannessen* v. *United States,* 225 U. S. 227, 242; *Satterlee* v. *Matthewson,* 2 Pet. 380, 413; *Curtis* v. *Whitney,* 13 Wall. 68, 70; *Kentucky Union Co.* v. *Kentucky,* 219 U. S. 140, 152, 153.

This Court has sustained State tax laws which were retroactive in scope. (*Carpenter* v. *Pennsylvania,* 17 How. 456, 463; *Orr* v. *Gilman,* 183 U. S. 278; and see *Locke* v. *New Orleans,* 4 Wall. 172,

173; *Seattle* v. *Kelleher,* 195 U. S. 351, 359, 360; *State* v. *Bell,* 61 N. C. 76, 83, 86.)

It has sustained similar Federal taxes. Thus, in *Stockdale* v. *Insurance Companies,* 20 Wall. 323, it sustained the Act of July 14, 1870, c. 255, 16 Stat. 256, 261, by which an earlier statute which might be supposed to have expired was revived and continued in existence for two years longer. The Court said (pp. 331, 332):

> The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, can not be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed. The joint resolution of July 4th, 1864, imposed a tax of five per cent upon all income of the previous year, although one tax on it had already been paid, and no one doubted the validity of the tax or attempted to resist it.
>
> * * * * *
>
> But where it can exercise a power by passing a new statute, which may be retroactive in its effect, the form of words which it uses to put this power in operation can not be material, if the purpose is clear, and that purpose is within the power. Congress could have passed a law to reimpose this tax retrospectively, to revive the sections under consideration if they had expired, to reenact the law by a simple reference to the sections. Has it done anything more?

This decision was followed in *Railroad Co.* v. *Rose,* 95 U. S. 78, 80.

In *Billings* v. *United States,* 232 U. S. 261, the Court sustained the Act of August 5, 1909, c. 6, 36 Stat. 11, 112, which levied a tax to be collected annually on September first on the use of foreign-built pleasure boats owned or chartered by citizens of the United States, saying (p. 282):

> Again let it be conceded that the causing the tax for the annual period to become due in September, 1909, is to give it in some respects a retroactive effect, such concession does not cause the act to be beyond the power of Congress under the Constitution to adopt.

And in *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1, it sustained the sections of the Act of October 3, 1913, c. 16, 38 Stat. 114, 166, which provided a general income tax from December to December of each year but exceptionally fixed a first period embracing the time from March 1 to December 31, 1913. This limited retroactivity was assailed as repugnant to the due process clause of the Fifth Amendment. The Court (p. 20) declared that this contention was not entitled to further consideration, citing *Stockdale* v. *Insurance Companies, supra.*

So also, without discussing the validity of retroactive taxation, the Court in *Railroad Co.* v. *Collector,* 100 U. S. 595, 597, sustained that portion of the Act of July 13, 1866, c. 184, 14 Stat. 98, 138, 139, which imposed upon corporations a tax meas-

ured by the interest paid on their bonds, the case involving interest on bonds issued long before the law was enacted; in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, it sustained the provisions of the Act of August 5, 1909, c. 6, 36 Stat. 11, 112, 114, which based a tax upon the net income from the then current calendar year; and in *Hecht* v. *Malley*, 265 U. S. 144, 164, it enforced a retroactive feature of the revenue law which was enacted February 24, 1919 (c. 18, 40 Stat. 1057, 1126), and which levied taxes for the entire year ending June 30, 1919. The income and excess profits provisions of that Act applied to the entire calendar year 1918.

The authorities which have been cited fully establish the broad general rule that Congress may constitutionally impose retroactive taxes. And the circumstances attending the enactment of the tax provision which is involved in the present case show no justification for this challenge of its validity.

## IV

### A TAX UPON TRANSFERS OF PROPERTY BY GIFT IS NOT A DIRECT TAX BUT AN EXCISE

Congress may not lay an export tax or tax the instrumentalities of the State governments. Otherwise its power of taxation is unlimited, provided only that duties, imports, and excises shall be uniform (Constitution, Art. I, Sec. 8), and direct taxes, except income taxes under the Sixteenth Amend-

ment, shall be apportioned (Constitution, Art. I, Sec. 1). The taxing power of Congress "is exhaustive and embraces every conceivable power of taxation." *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 12. The gift tax, not being a tax upon exports, and being uniform, is beyond constitutional objection unless it is a direct tax.

Direct taxes are, besides capitation taxes, taxes which are levied on persons solely because of their general ownership of property and taxes which are the legal equivalent of such property taxes. This Court went thus far in the Income Tax Cases, but refused to give any broader meaning to the term. Every other tax is indirect regardless of the question whether it may be shifted from the person on whom it is first cast by law, and regardless of the question whether it may be avoided. Apparently the only legal equivalent of a tax on the general ownership of property is a tax on the income from such property.

In *Knowlton* v. *Moore*, 178 U. S. 41, which arose under the provisions of the War Revenue Act of 1898, c. 448, 30 Stat. 448, imposing a tax upon legacies, the Court pointed out that its decision in the Income Tax Cases did not furnish any basis for a rule broader than that set forth above, saying (p. 82):

> It is true that in the income tax cases the theory of certain economists by which direct and indirect taxes are classified with reference to the ability to shift the same was ad-

verted to. But this disputable theory was not the basis of the conclusion of the court. The constitutional meaning of the word direct was the matter decided. Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts and excises which are not the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall.

And in *New York Trust Co.* v. *Eisner,* 256 U. S. 345, 349, involving the estate tax under the Act of September 8, 1916, c. 463, Sec. 201, 39 Stat. 756, 777, it was held that there was no force in the con-

tention that as a tax upon the transfer of the net assets of a decedent's estate could not be avoided the tax was therefore a direct one.

As indicated by the quotation from the opinion in *Knowlton* v. *Moore, supra,* direct taxes are only those which are essentially equivalent to taxes on property generally, real or personal, solely because of its ownership. The same terms were used in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 150, in deciding that a tax upon the privilege of doing business in a corporate capacity was not a direct tax. The Court based this conclusion upon the ground that the tax was not "upon property solely because of its ownership."

So in *Dawson* v. *Kentucky Distilleries & Warehouse Company,* 255 U. S. 288, 294, this Court said:

> The tax might be said to be upon the act of removal from the bonded warehouse within the State. But as stated by the lower court, "the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, i. e., consumption, sale or keeping for future consumption or sale. * * * The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value." To levy a tax by reason of ownership of property is to tax the property.

A tax upon the transfer of property by gift is not equivalent to a tax upon property because of its ownership. It does not interfere with "the only uses of what it is capable." There are many useful things which one may do with his property besides giving it away. And he may give it away for religious, charitable, or public purposes without tax.

It is, rather, on the same basis as a tax on the transfer of an estate at death or one on the transfer of property by sale, or similar taxes. All such taxes have been sustained as excises.

Thus in *Scholey* v. *Rew,* 23 Wall. 331, it was held that a tax upon the succession to real estate upon the death of another was not a tax upon land but a duty or excise. This decision was not questioned in *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 577. It was followed in *Knowlton* v. *Moore,* 178 U. S. 41, where a tax upon the receiving of legacies was sustained as an indirect tax. In *Snyder* v. *Bettman,* 190 U. S. 249, a succession tax was enforced in the case of a transmission of property by legacy to a municipality, upon the ground that the tax was not upon the property but upon the right to succeed to the property (p. 254). And in *New York Trust Co.* v. *Eisner,* 256 U. S. 345, the case of *Knowlton* v. *Moore* was cited as disposing of the contention that a tax upon the transfer of the net estate of every decedent, to be paid by the executor, was a direct tax, the Court saying that

such a tax has always been regarded as the antithesis of a direct one (p. 349):

> It is argued that when the tax is on the privilege of receiving, the tax is indirect because it may be avoided, whereas here the tax is inevitable and therefore direct. But that matter also is disposed of by *Knowlton* v. *Moore,* not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; "has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy." 178 U. S. 81–83. Upon this point a page of history is worth a volume of logic.

The debates in Congress, heretofore referred to, show that the gift tax was intended to be supplemental to the estate tax and the income tax, and to prevent evasion of those taxes. And it is significant that the exemptions from tax of gifts for religious and charitable purposes are similar to the exemptions under the Estate Tax provisions (Section 303). A tax upon a transfer by gift is analogous to a tax upon a transfer at death or by sale. All such taxes are sustained as excises.

Thus taxes upon particular types of sales. *Nicol* v. *Ames,* 173 U. S. 509; *Thomas* v. *United States,* 192 U. S. 363; see also *Pacific Insurance Company* v. *Soule,* 7 Wall. 433, 446.

Particular commodities—*Hylton* v. *United States,* 3 Dall. 171; *Veazie Bank* v. *Fenno,* 8 Wall. 533; *Patton* v. *Brady,* 184 U. S. 608; *McCray* v. *United States,* 195 U. S. 27; see also *Billings* v. *United States,* 232 U. S. 261; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642, 649.

Particular methods of doing business—*Spreckels Sugar Refining Company* v. *McClain,* 192 U. S. 397; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Stratton's Independence* v. *Howbert,* 231 U. S. 399, 414; see also *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179, 183.

If a tax upon a designated type of transfer of property, or upon the transfer of a designated type of property, must be sustained as an indirect tax, it necessarily follows that a tax upon the gratuitous transfer of property *inter vivos,* that is a particularly designated type of transfer, must be so classed.

The Revenue Act of February 24, 1919, c. 18, 40 Stat. 1057, imposed a great number of excise taxes upon many different things and transactions, among them being a tax upon the amount paid for transportation, including accommodations in sleeping cars, telegraph and telephone messages (Section 500, pp. 1101, 1102); upon insurance policies (Section 503, p. 1104); upon beverages (Section 600, p. 1105), including a floor tax upon distilled spirits (Section 604, p. 1107); upon cigars and tobacco (Section 700, p. 1116); upon admissions to places of amusement (Section 800, p. 1120); upon

membership dues in clubs (Section 801, p. 1121), and upon sales of all sorts of articles, including automobiles, pianos, tennis rackets, skates, baseball bats, chewing gum, electric fans, and soap (Section 900, p. 1122); carpets, picture frames, umbrellas, and various kinds of wearing apparel (Section 904, p. 1123). It also imposed taxes in the form of stamps upon bonds, capital stock issues, and capital stock transfers and deeds (Section 1100, p. 1135). It is difficult to see how a tax upon the sale of property differs in principle from a tax upon a gift of property.

*Brown* v. *Maryland,* 12 Wheat. 419, and similar cases have no bearing upon the question at issue. They have been distinguished by this Court repeatedly, as in *Nicol* v. *Ames,* 173 U. S. 509, 518; *Thomas* v. *United States,* 192 U. S. 363, 371; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 162–167; *New York Trust Co.* v. *Eisner,* 256 U. S. 345, 348. It is true that where a State may not constitutionally tax a transaction in any manner whatever, an indirect method of reaching a prohibited result is unconstitutional. But as Congress has the right to lay both direct and indirect taxes if it lays them on the permitted bases (*Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1, 13)—to tax property if it follows the rule of apportionment and dealings in property if it follows the rule of uniformity—there would be far less reason for considering whether a Federal excise tax were a subterfuge for the reaching of a prohibited end even though the

tax which purported to be indirect should have in its effects some points of resemblance to a conceivable direct tax. Moreover, there is nothing exceptional in the levying of excises. They have long been recognized as appropriate and normal methods of raising revenues. Indeed, taxation by uniform laws and not by apportionment among the States constitutes the only fair method of raising the revenues necessary for the running of the Government. To say that a tax must be collected by apportionment as a direct tax is, practically, to say that it is not a possible source of revenue. Under these circumstances there certainly can not be any presumption that a tax closely analogous to taxes which have been repeatedly sustained as indirect taxes is in its essence a direct tax. On the contrary, there must be a strong presumption of its validity.

As this Court said in *Nicol* v. *Ames,* 173 U. S. 509, 515:

> It is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the Government rest. This is particularly true of a revenue act of Congress. * * * The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes

to the natural man. It is not only the power to destroy, but it is also the power to keep alive.

The time has long since passed, of course, when the right to impose an excise tax is sustained upon the theory that the transaction taxed was the exercise of a privilege conferred by the sovereign authority.

*Billings* v. *United States,* 232 U. S. 261; *Hylton* v. *United States,* 3 Dall. 171; *Thomas* v. *United States,* 192 U. S. 363.

V

The judgment of the Circuit Court of Appeals should be affirmed.

WILLIAM D. MITCHELL,
*Solicitor General.*
ALFRED A. WHEAT,
*Special Assistant to the Attorney General.*
ROBERT P. REEDER,
*Special Assistant to the Attorney General.*

JANUARY, 1928.

## APPENDIX

(Act of June 2, 1924, c. 234, 43 Stat. 253; U. S. C., Title 26, Secs. 1131–1136)

SEC. 319. For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly:

[Here follow the rates of tax.]

SEC. 320. If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

SEC. 321. In computing the amount of the gifts subject to the tax imposed by section 319, there shall be allowed as deductions:

(a) In the case of a resident—

(1) An exemption of $50,000;

(2) The amount of all gifts or contributions made within the calendar year to or for the use of

the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees, or fraternal society, order, or association, operating under the lodge system, but only if such gifts or contributions are to be used by such trustee or trustees or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year by such corporation, trustee, or fraternal society, order, or association for a religious, charitable, scientific, literary, or educational purpose, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year to the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act;

(3) Gifts the aggregate amount of which to any one person does not exceed $500;

(4) An amount equal to the value of any property transferred by gift within the calendar year, which can be identified (A) as having been received by the donor within five years prior to the time of his making such gift, either from another person

by gift or from a decedent by gift, bequest, devise, or inheritance, or (B) as having been acquired in exchange for property so received. This deduction shall be allowed only where a gift tax or an estate tax under this or any prior act of Congress was paid by or on behalf of the donor or the estate of such decedent, as the case may be, and only in the amount of the value placed by the Commissioner on such property in determining the value of the gift or the gross estate of such decedent, and only to the extent that the value of such property is included in the total amount of gifts made within the calendar year and not deducted under paragraph (2) or (3) of this subdivision.

* * * * *

SEC. 322. In case a tax has been imposed under section 319 upon any gift, and thereafter upon the death of the donor the amount thereof is required by any provision of Part I of this title to be included in the gross estate of the decedent then there shall be credited against and applied in reduction of the estate tax, which would otherwise be chargeable against the estate of the decedent under the provisions of section 301, an amount equal to the tax paid with respect to such gift; and in the event the donor has in any year paid the tax imposed by section 319 with respect to a gift or gifts which upon the death of the donor must be included in his gross estate and a gift or gifts not required to be so included, then the amount of the tax which shall be deemed to have been paid with respect to the gift or gifts required to be so included shall be that proportion of the entire tax paid on account of all such gifts which the amount of the gift or gifts required

to be so included bears to the total amount of gifts in that year.

SEC. 323. Any person who within the year 1924 or any calendar year thereafter makes any gift or gifts in excess of the deductions allowed by section 321 shall, on or before the 15th day of March, file with the collector a return under oath in duplicate, listing and setting forth therein all gifts and contributions made by him during such calendar year (other than the gifts specified in paragraph (3) of subdivision (a) and in paragraph (2) of subdivision (b) of section 321), and the fair market value thereof when made, and also all sales and exchanges of property owned by him made within such year for less than a fair consideration in money or money's worth, stating therein the fair market value of the property so sold or exchanged and that of the consideration received by him, both as of the date of such sale or exchange.

SEC. 324. The tax imposed by section 319 shall be paid by the donor on or before the 15th day of March, and shall be assessed, collected, and paid in the same manner and subject, in so far as applicable, to the same provisions of law as the tax imposed by section 301.

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